THIS OPINION WAS NOT WRITTEN FOR PUBLICATION

The opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.

Paper No. 28

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte DANNY L. NICKERSON

Appeal No. 97-1277
Application 07/820,261[1]

ON BRIEF

Before JERRY SMITH, FLEMING, and FRAHM, Administrative Patent Judges.

JERRY SMITH, Administrative Patent Judge.

DECISION ON APPEAL

---

[1] Application for patent filed January 14, 1992.

This is a decision on the appeal under 35 U.S.C. § 134 from the examiner's rejection of claims 13-19, 23, 30-32 and 34-44, which constitute all the claims remaining in the application. An amendment after final rejection was filed on October 30, 1995 and was entered by the examiner.

The disclosed invention pertains to an electronic device for automatically maintaining a record of events which take place during the course of a baseball game. More particularly, the invention seeks to simplify the manual task of keeping a scorecard of all events which describe the course of a baseball game. Data representative of all the events of a baseball game is entered into the device, and the device can print out a complete record of the game at the conclusion of the game.

Representative claims 13 and 41 are reproduced as follows:

13. An electronic baseball scorekeeper, for keeping the score of a real baseball game played by real players on a field, comprising:

a plurality of field position manually operable elements each of which elements is dedicated to a given field position,

a plurality of event manually operable elements each of

which elements is dedicated to a single type of game event;

a plurality of manually operable alphabet elements for entry of a list of player names by operating different ones of said alphabet elements for the different letters of the alphabet, respectively, that are entered;

storage means for storing said list of player names, events and statistics;

display means for display of events, said list of player names and statistics,

processor means, including said storage means, and having a first mode for accepting said list of player names from said alphabet elements, a second mode for providing said list to said display, a third mode for entering data from said field position elements and said event elements into said processor means, a fourth mode for calculating statistics including the score and a fifth mode for providing statistical information to said display,

said processor means advancing from player to player on said list as necessary to cause at least a part of said event data and at least a part of said field position data to be provided to said processor means as related to the proper player on said list.

41. A device for providing information on a real baseball game that progresses through plural half innings and that has real players of two real teams playing on a real baseball field with at least some of the players coming up to bat and while at bat one or more events happen, comprising:

processor means including a memory,

user entry means for entering into said processor means a list of at least some of said players that come to bat

and including manually operable elements for entering into said processor means signals that represent at least some of said events,

said processor means including means for associating with each of at least some of the names of players on said list

the signals representing events that occurred while the player was at bat, and

means for making a visual indication of the name of a player together with at least one event that occurred while the player was at bat.

The examiner relies on the following references:

Peters, Jr. (Peters)	4,266,214	May 05, 1981
Klose	4,324,402	Apr. 13, 1982

Claims 13-19, 23, 30-32 and 34-44 stand rejected under 35 U.S.C. § 103. As evidence of obviousness the examiner offers Peters and Klose taken together.

Rather than repeat the arguments of appellant or the examiner, we make reference to the briefs and the answer for the respective details thereof.

OPINION

We have carefully considered the subject matter on appeal, the rejection advanced by the examiner and the evidence of obviousness relied upon by the examiner as support

for the rejection. We have, likewise, reviewed and taken into consideration, in reaching our decision, the appellant's arguments set forth in the briefs along with the examiner's rationale in support of the rejection and arguments in rebuttal set forth in the examiner's answer.

It is our view, after consideration of the record before us, that the evidence relied upon and the level of skill in the particular art would have suggested to one of ordinary skill in the art the obviousness of the invention as set forth in claims 41-44. We reach the opposite conclusion with respect to claims 13-19, 23, 30-32 and 34-40. Accordingly, we affirm-in-part.

As a general proposition in an appeal involving a rejection under 35 U.S.C. § 103, an examiner is under a burden to make out a prima facie case of obviousness. If that burden is met, the burden of going forward then shifts to the applicant to overcome the prima facie case with argument and/or evidence. Obviousness is then determined on the basis of the evidence as a whole and the relative persuasiveness of the arguments.

See In re Oetiker, 977 F.2d 1443, 1445, 24 USPQ2d 1443, 1444

(Fed. Cir. 1992); In re Hedges, 783 F.2d 1038, 1039, 228 USPQ 685, 686 (Fed. Cir. 1986); In re Piasecki, 745 F.2d 1468, 1472, 223 USPQ 785, 788 (Fed. Cir. 1984); and In re Rinehart, 531 F.2d 1048, 1052, 189 USPQ 143, 147 (CCPA 1976). Only those arguments actually made by appellant have been considered in this decision. Arguments which appellant could have made but chose not to make in the brief have not been considered [see 37 CFR § 1.192(a)].

With respect to each of the appealed claims, the examiner has pointed out the teachings of Peters and Klose, has pointed out the perceived differences between this prior art and the claimed invention, and has indicated how and why Peters and Klose would have been modified and/or combined to arrive at the claimed invention [answer, pages 3-7]. In our view, regardless of the ultimate outcome of this issue, the examiner's analysis is sufficiently reasonable that we find that the examiner has satisfied the burden of presenting a prima facie case of obviousness. That is, the examiner's analysis, if left unrebutted, would be sufficient to support a rejection under

35 U.S.C. § 103. We also note that the examiner has responded to each of appellant's arguments so that the record is complete on the examiner's factual findings and reasoning upon which the conclusion of obviousness is based. The burden is, therefore, upon appellant to come forward with evidence or arguments which persuasively rebut the examiner's prima facie case of obviousness. Appellant has presented several substantive arguments in response to the examiner's rejection. Therefore, we consider obviousness based upon the totality of the evidence and the relative persuasiveness of the arguments.

Before we consider the propriety of the rejection against specific claims, a brief review of the applied prior art and the skill of the artisan is presented. Peters teaches an electronic device for automatically keeping score of a game played by several players and which is dividable into repetitive units. Although the main embodiment of Peters is directed to the scoring of a golf game, Peters also suggests that his device can be appropriately configured to score a baseball game. Klose teaches an electronic device in which a game of baseball can be simulated. Klose's device has a

simulated playing field thereon, and display elements are situated around the simulated field to simulate various movements which occur in a real baseball game.

The rejection also depends to a great degree on the knowledge of the avid baseball fan as to how a baseball game is officially recorded and scored. It should be noted that avid baseball fans have been manually filling out scorecards for years to provide a complete record of the events of a baseball game they are watching. There are many conventional scoring notations and shortcuts used by these fans to simplify the manual entry of this data onto the scorecard. The typical scorecard has an area for the players of each team to be listed in successive rows while the various innings to be played are situated in successive columns. Events during the course of a game are typically recorded on the scorecard at the intersection of the player who is at bat and the inning being played.

The main shortcut to scoring a game of baseball is that each of the defensive positions is assigned a number from 1 to 9. Therefore, when a batter is thrown out at first on a grounder to third for example, the event is manually recorded

as “5-3" indicating a throw out from third base (5) to first base (3). A fly out to the left fielder for example is manually recorded as simply “7" indicating a catch by the left fielder (7). Hits and other events are also manually recorded on the scorecard using some shorthand form of entry.

When we consider Peter’s desire to create an electronic scoring device for a baseball game, we broadly assume that the avid baseball fan would have been motivated to electronically automate and duplicate the manual scorecard to the extent necessary to provide an accurate record of the baseball game. Appellant’s claims are directed to various aspects of scoring a baseball game. Some of these scoring aspects are recited fairly broadly and some scoring aspects are necessary for an electronic device to properly maintain an electronic scorecard of the game. Our obviousness determinations are primarily controlled by the extent to which appellant’s claims patentably distinguish appellant’s electronic baseball scorekeeper from an electronic scorekeeper created by the avid baseball fan in modifying Peter’s device to be an accurate and complete baseball scorekeeper.

We consider first independent claim 13. Appellant

argues several features of this claim are not obviously suggested by the prior art. Appellant argues that manually operable elements for field position and events create a highly advantageous data entry capability. Although we find that Peters suggests such event keys to the avid baseball fan, we agree with appellant that the manually operable elements dedicated to a given field position are not suggested by the prior art. This recitation of claim 13 means that there are nine keys whose sole function is to indicate entry of one of the defensive positions. Since a baseball scorecard normally indicates defensive positions by numbers 1 through 9, these defensive positions could easily be entered by standard, nondedicated number keys. Although the use of dedicated field position keys enables data to be entered more easily by the novice fan, such advantage is apparent only from appellant's own disclosure. There is no suggestion in Peters or in the conventional scoring of a baseball game that would have suggested the obviousness of these dedicated keys.

The examiner apparently relies on Klose as overcoming this deficiency of Peters. We agree with appellant that the

combination of Klose with Peters, as proposed by the examiner, makes no sense. Klose simulates a baseball game being played so that there is a simulated baseball field permanently drawn on the display. The display also has several defensive positions indicated by permanently drawn characters (see outfield, pitcher and catcher). Klose also has display elements at strategic parts of the simulated field to indicate movement within the baseball game. It should be noted that Klose teaches no dedicated field position input elements. To the extent that Klose teaches anything related to a field position, Klose teaches output elements rather than input elements. There is nothing in Klose which would have suggested the obviousness of the claimed dedicated field position manually operable elements.

Appellant also argues that the manually operable alphabet elements and the five modes for the processor means are not suggested by the prior art. With respect to the alphabet input elements, we do not agree. The conventional manually created scorecard clearly has an area for and requires the input of the various player names in the lineup. The artisan would have appreciated that an electronic baseball

scorecard must accept the input of player names. In our view, the artisan would have found it obvious to enter the player names into such an electronic device by manually operable alphabet elements as broadly recited in claim 13.

With respect to the processor means, we do not agree with appellant that the first three modes of claim 13 are not suggested by the prior art. When the Peters' device is modified to become a baseball scorecard by the avid baseball fan, the fan would realize that the entry of player names in keeping a scorecard is essential. Likewise, the display of this list of players (the lineup) would be clearly suggested to the artisan. Finally, the Peters baseball scorecard device would have to permit entry of field position information and event information. Thus, the functions recited in claim 13 for the processor means would have to be carried out by any electronic device accurately functioning as a baseball scorecard. The identification of these different functions of a baseball scorekeeper as different modes of operation is not a patentably nonobvious distinction.

Although we have found many of appellant's arguments with respect to claim 13 to be nonpersuasive, we do agree with

appellant that the recitation of field position manually operable elements dedicated to a given field position is not suggested by the applied prior art. Therefore, we do not sustain the rejection of claim 13 or of claims 14-19 and 30-32 which depend therefrom.

With respect to independent claim 23, appellant argues that the prior art does not teach or suggest a means for suspending the game mode and switching to the substitute player entry mode as recited therein [brief, page 17]. The examiner simply responds that it would have been obvious to suspend the game mode and switch to the substitute player mode because it was common in baseball to have substitute players enter the game [answer, page 17]. Although we agree with the examiner that it is common in the game of baseball to make substitutions, we see no reason why the game would have to be suspended in order to do this. Appellant has claimed a specific way to make player substitutions, and this claimed way is not suggested by the applied prior art.

Appellant also argues that claim 23 recites some dual function manually operable elements which enter player names in a player entry mode and event data in a game playing mode.

As we noted above with respect to claim 13, any baseball scorekeeping device must permit the entry of player names and the entry of event information. Peters suggests the use of a switch which can adjust the mode of data being input into the device. Thus, the idea of broadly using the same input elements to enter two different kinds of data would have been obvious in view of the teachings of Peters and the common dual mode keys of conventional calculators.

Appellant also argues that a means for associating event data entered in the processor with the name of the player who was at bat at the time that the event occurred is not suggested by the applied prior art. We are not persuaded by this argument since the baseball fan would have realized that events of a game such as balls and strikes must be associated with the player who is at bat. The modified Peters device would have to have this capability in order to create an accurate record of a baseball game.

Although we have found many of appellant's arguments with respect to claim 23 to be nonpersuasive, we do agree with appellant that the recitation of a program means for suspending the game mode and switching to the substitute

player entry mode is not suggested by the applied prior art. Therefore, we do not sustain the rejection of claim 23 or of claims 34-36 which depend therefrom.

With respect to independent claim 37, appellant makes many of the same arguments which we have considered above. Although we do not agree with all of appellant's arguments for reasons discussed above, we note that claim 37 recites a set of manually operable elements, "each element of which is dedicated to one of said player positions." As we noted above in our consideration of claim 13, the applied prior art does not teach or suggest such a dedicated arrangement of input elements. This simplifies the entry of event data into the device. We also indicated above why Klose adds nothing of interest or relevance with respect to this claim recitation. Therefore, we do not sustain the rejection of claim 37 or of claims 38-40 which depend therefrom.

With respect to independent claim 41, appellant argues that the combination of means recited therein relates to patentable subject matter [brief, pages 23-24]. The first means of claim 41 is directed to manually operable elements

for entering player names and events into the processing means. For reasons discussed above, any electronic baseball scorekeeper for the avid fan must permit the entry of player names (the lineup) and events which take place such as balls and strikes. The second means of claim 41 recites that the processor means associates events with the player who was at bat. We considered the obviousness of this feature in our discussion of claim 23 above. Finally, the third means of claim 41 recites a means for visually indicating the name of a player and an event which occurred while the player was at bat. This feature is the whole point of a baseball scorecard and would clearly have been included in any scorekeeper of Peters which is modified to be a complete and accurate baseball scorekeeper. Therefore, we find that each of the means of claim 41, as broadly recited therein, would necessarily be present in any electronic baseball scorekeeper created by the avid baseball fan. For purposes of the breadth of claim 41, Peters alone and the knowledge of the baseball fan are sufficient to suggest the claimed invention. Therefore, we treat Klose as being unnecessary and cumulative to the teachings of Peters and the knowledge of the baseball

fan. Accordingly, we sustain the rejection of independent claim 41 as being unpatentable over the teachings of Peters.

With respect to dependent claim 42, appellant argues that Peters does not suggest the player entry mode and game mode as recited therein. As noted previously, these two modes have to be present in the Peters electronic baseball scorekeeper whether or not Peters specifically refers to them as modes. Player names must be entered before the game begins and event data must be entered during the course of a game. The obviousness of dual mode keys has been discussed above. The recitations of dependent claim 43 would have clearly been met by the ball or strike input means of the Peters baseball scorekeeper. The obviousness of the recitations of claim 44 has been discussed above. Therefore, we also sustain the rejection of dependent claims 42-44 as unpatentable over the teachings of Peters.

We note appellant's arguments that the examiner has not properly interpreted the means language of the claims as required by In re Donaldson, 16 F.3d 1189, 29 USPQ2d 1845 (Fed. Cir. 1994). The disclosed invention has a plurality of manually operable input elements and a processing means. The

electronic scorekeeper of Peters created by the avid baseball fan would have manually operable input elements and a processing means. Appellant has not presented any persuasive arguments that would lead us to conclude that the claimed invention is structurally nonobvious over the similar structure of the modified Peters baseball scorekeeper.

In summary, we have sustained the examiner's rejection of claims 41-44, but we have not sustained the rejection of claims 13-19, 23, 30-32 and 34-40. Accordingly, the decision of the examiner rejecting claims 13-19, 23, 30-32 and 34-44 is affirmed-in-part.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a).

AFFIRMED-IN-PART

JERRY SMITH Administrative Patent Judge	)
MICHAEL R. FLEMING Administrative Patent Judge	) BOARD OF PATENT)) APPEALS AND)) INTERFERENCES
ERIC S. FRAHM Administrative Patent Judge	)

JS/dm

William D. Hall
10850 Stanmore Dr.
Potomac, MD 20854-1522